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No. 95-992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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QUESTION PRESENTED

Whether, in the absence of any jeopardy to the health of the overall system of free, local broadcast television (nationally or in particular markets), the First Amendment permits Congress to impose on all cable operators a requirement of mandatory carriage of local broadcast stations in preference to all other programmers.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are identified at pages ii-iii of the Jurisdictional Statement. Pursuant to Rule 29.6 of the Rules of this Court, appellant National Cable Television Association, Inc., states that it has no parent company and no subsidiaries.

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OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-112a) is reported at 910 F. Supp. 734. The opinion of this Court remanding the case to the district court is reported at 114 S. Ct. 2445. The prior opinion of the district court is reported at 819 F. Supp. 32.

JURISDICTION

The order of the district court was entered on December 12, 1995. J.S. App. 1a. The judgment was entered on December 20, 1995. J.S. App. 153a. A timely notice of appeal was filed in the district court on December 21, 1995. J.S. App. 149a. This Court has appellate jurisdiction under 28 U.S.C. § 1253 and 47 U.S.C. § 555(c)(1). This Court noted probable jurisdiction on January 16, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Relevant provisions of the Cable Act are reprinted at J.S. App. 113a-143a.

STATEMENT

Appellants brought this action in 1992 before a three-judge district court seeking (among other things) to enjoin enforcement of the so-called "must-carry" provisions of the Cable Act, 47 U.S.C. §§ 534 & 535, which require that cable operators carry the programming of commercial and noncommercial television broadcasters. The district court, by a 2-1 vote, upheld the provisions, but this Court vacated the judgment and remanded the case for further proceedings. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), *rev'g* 819 F. Supp. 32 (1993). On remand, the district court by a 2-1 vote again upheld the challenged statutory provisions, granting appellees' motions for summary judgment and denying appellants' motions.

1. The background of this dispute is comprehensively explained in Justice Kennedy's opinion for the Court in *Turner*, 114 S. Ct. at 2451-56. The Court unanimously rejected the Government's claim for review under the rational-basis standard or the deferential standard applicable to broadcast regulation. *Id.* at 2456-58. By a 5-4 vote, this Court then held that the constitutionality of the Cable Act's must-carry regime is to be analyzed under the two-part First Amendment test for intermediate scrutiny outlined in *United States v. O'Brien*, 391 U.S. 367 (1968). *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The Court thus demanded a showing by the Government that the law (1) serves a substantial speech-neutral government interest and (2) is narrowly tailored—*i.e.*, burdens freedom of speech no more than necessary—to serve that interest. 114 S. Ct. at 2469.

On the basis of the record then before the Court, seven Justices in *Turner* concluded that the Government had failed to meet its burden of justifying the must-carry law under intermediate scrutiny. The four-Justice plurality found itself "unable to conclude that the Government has

satisfied either inquiry" mandated by *O'Brien* (114 S. Ct. at 2470) and concluded that the case should be remanded for development of "a more thorough factual record" concerning both parts of the *O'Brien* analysis. 114 S. Ct. at 2472. Four Justices would have invalidated the statute under strict scrutiny (*id.* at 2475 (O'Connor, J., dissenting); *id.* at 2481 (Ginsburg, J., dissenting)); three of those Justices also found the law to fail *O'Brien* scrutiny (*id.* at 2479-80 (O'Connor, J., dissenting)). Justice Stevens would have affirmed the district court but, lest no disposition command a majority, concurred in the judgment remanding for further proceedings. *Id.* at 2475.

On the "substantial governmental interest" branch of *O'Brien*, the Court concluded that the Government's asserted interest—preserving the economic viability of free, over-the-air, local broadcast television—is "important in the abstract." 114 S. Ct. at 2470 (plurality). But, the plurality explained, the Government, when regulating speech, "must do more than simply 'posit the existence of the disease sought to be cured.'" *Ibid.* (citation omitted). Rather, the Government "must demonstrate that the recited harms are real, not merely conjectural." *Ibid.* The plurality thus defined as follows the proper inquiry in this case under the first branch of *O'Brien*: "whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry." 114 S. Ct. at 2470.

Even if the Government could meet its burden on this first question, the plurality explained that "the Government still bears the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" 114 S. Ct. at 2470 (citation omitted). This "narrow tailoring" step of the *O'Brien* analysis involves two subsidiary inquiries, as to both of which the record was deficient. First, the plurality cited the lack of "any findings concerning the actual effects of must-carry on the

speech of cable operators and cable programmers," *i.e.*, "the extent to which the must-carry provisions in fact interfere with protected speech." *Id.* at 2472. Second, the plurality noted the absence of "any judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." *Ibid.* (citation omitted).

2. On remand, a sharply divided district court sustained the must-carry regime. Judge Sporkin concluded that appellees were entitled to summary judgment upholding the statute. J.S. App. 1a-32a. Judge Williams concluded that appellants were entitled to summary judgment invalidating the statute. J.S. App. 38a-112a. Judge Jackson believed that a trial was necessary but joined the result reached by Judge Sporkin to avoid "prevail[ing] by stalemate." J.S. App. 33a-37a.

a. Judge Sporkin concluded that evidence introduced by appellees in Congress and on remand amounted to "substantial evidence" from which Congress could draw a "reasonable inference" that the must-carry law was necessary. J.S. App. 6a. The first question posed by this Court's remand was "whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry." *Turner*, 114 S. Ct. at 2470. Although this Court, in remanding the case, instructed the district court that the proper inquiry was whether "the must-carry rules are necessary to protect the viability of broadcast television" (*id.* at 2471), Judge Sporkin nevertheless rejected the idea that "the Court should examine the broadcasting industry *as a whole*." J.S. App. 8a-9a n.11 (emphasis in original). Instead, he concluded, "[t]he relevant inquiry is whether the health *of those broadcasters protected by the must-carry provisions* would be in jeopardy without the provisions." *Ibid.* (emphasis added). According to Judge Sporkin, "[t]he Supreme Court never really questioned Congress' decision that the group of broadcasters covered by the must-carry provisions are entitled to the protections afforded by those provisions if they are in genuine jeopardy, so long as the regulations meet the narrow tailoring requirements." *Ibid.*

Having defined the "harm to broadcasting" interest in that way, Judge Sporkin, citing broadcasters' congressional testimony and the 1988 FCC Carriage Survey previously deemed inconclusive by the plurality opinion in this Court (114 S. Ct. at 2471-72), then concluded that Congress reasonably inferred that " 'significant' numbers of broadcast stations would be refused carriage" absent must-carry rules. J.S. App. 13a; *see id.* at 9a-13a. Judge Sporkin noted some economic incentives of cable operators to deny carriage to broadcasters (*id.* at 9a-10a, 14a) and explained: "Obviously, this case itself confirms that the cable industry would drop broadcast stations if the must-carry rules were not in place." *Id.* at 13a. Judge Sporkin also discerned substantial evidence that stations denied carriage would thereby be harmed (*id.* at 15a-18a), stating: "That a broadcast station that was denied access to the cable system in its local market would suffer financial harm and possible ruin seems to be an obvious conclusion." *Id.* at 15a. Judge Sporkin made no mention of the numbers showing that a broadcast station, on average, has roughly 50 cable systems in its local market (the so-called "Area of Dominant Influence," the area in which its signal can generally be viewed over the air). J.S. App. 43a n.1 (Williams, J., dissenting).

In addressing the "actual effects" of the must-carry law on cable speakers (*Turner*, 114 S. Ct. at 2472), Judge Sporkin ignored the fact that, in the face of undisputed limited capacity of cable systems (*i.e.*, capacity is far less than programmers' demand), there is a one-for-one correspondence between forced carriage of broadcasters and foreclosed opportunities for cable programmers: each channel occupied by a broadcast station as a result of compelled carriage, whether added in 1992 or frozen in place at that time, is thereby closed off to cable programmers. Instead, Judge Sporkin focused on the particular additions and drops of stations and programmers that occurred when

the 1992 must-carry law took effect. J.S. App. 18a-22a. The evidence on remand revealed at least 5,880 instances in which broadcasters were added to cable systems as a result of the law, forcing cable systems to drop 780 programming services and reposition 1,385 cable programmers. *Id.* at 20a-21a. According to Judge Sporkin, these data showed that "the burden due to the must-carry rules has been small" and would likely "diminish as [cable systems'] channel capacity increases." *Id.* at 21a.

Turning to the "availability and efficacy of 'constitutionally acceptable less restrictive means'" (*Turner*, 114 S. Ct. at 2472), Judge Sporkin assumed *arguendo* that the five alternatives suggested by appellants were less restrictive but found that Congress could reasonably have found none of them to be "as effective." J.S. App. 23a. In this analysis, Judge Sporkin did not find the must-carry law narrowly tailored to any interest in preventing anticompetitive conduct or in preserving the health of the overall broadcast system. Rather, with respect to each suggested alternative, Judge Sporkin concluded simply that it was not as effective at serving the identified interest in adding to the revenues of each broadcaster claiming the law's protection. J.S. App. 23a-27a.

Judge Sporkin thus characterized a leased-access regime —affording nondiscriminatory cable-carriage rights to cable and broadcast programmers alike—as not "an equally effective alternative" because it would require broadcasters to pay a fee for carriage, and thus possibly to "reduce * * * expenditures on their programming." *Id.* at 26a. Judge Sporkin similarly rejected "A/B" switches and an earlier set of FCC must-carry rules on the simple ground that they would not aid broadcasters as much as the 1992 Act's requirements. *Id.* at 23a-26a.[1] And he

[1] Judge Sporkin also deemed a case-by-case review mechanism—designed, like the antitrust laws, to identify any anticompetitive acts among the mass of carriage decisions—inadequate because too burdensome. J.S. App. 26a-27a.

Among other matters, Judge Sporkin rejected appellants' free-speech challenge to low-power stations' must-carry eligibility, concluding that these provisions of the Cable Act "are very close to content-based legislation triggering strict scrutiny" but "do not * * * cross the line." *Id.* at 29a.

dismissed the idea of government subsidies on two grounds. First, he stated that "[p]resent and future budget restraints might reduce the enactment of subsidy legislation." J.S. App. 25a. Second, he said that "Congress would have to make the complex determinations as to who to subsidize, how much the subsidy would be and when the subsidy would end." J.S. App. 25a-26a. In his view, therefore, a law requiring forced carriage of essentially *all* stations was sufficiently "tailored" to pass constitutional muster.

b. Judge Jackson concurred in the result reached by Judge Sporkin, though only after stating that the disposition he actually thought proper was to "deny both cross-motions for summary judgment and set this case for trial." J.S. App. 33a. Reluctant, however, to "prevail by stalemate" as "a minority of one," Judge Jackson "elect[ed] to concur" with Judge Sporkin. *Ibid.* Unlike Judge Sporkin, Judge Jackson focused on the interest originally pressed by the Government—the prevention of harm to the health of broadcasting as a whole. He professed himself "satisfied that, *taken at face value*, the evidence before Congress in 1992 of an *impending demise of local broadcasting* was at least 'substantial' enough to warrant its prediction" by Congress. *Ibid.* (emphasis added). He was "also prepared to accept as minimal the burden must-carry imposes on the cable industry's First Amendment rights." *Ibid.* He did not address the efficacy of less restrictive means.

c. Judge Williams dissented. J.S. App. 38a-112a. In determining whether the Government had demonstrated "genuine jeopardy" to local broadcasting (*Turner*, 114 S. Ct. at 2470), Judge Williams interpreted this Court's mandate to require inquiry into whether the must-carry law is actually needed to maintain the health of the broadcast system *as a whole*, that is, to "preserve access to free

television programming for the 40 percent of Americans without cable" (*id.* at 2461). *See* J.S. App. 42a-43a. On this point, Judge Williams found the evidence undisputed: "The parties agree that there is no threat to the continued viability of broadcast television, either now in existence or looming on the horizon." *Id.* at 40a. "In fact," Judge Williams noted, "the defendants unequivocally concede, in the briefs and in the depositions of their experts, that the evidence they have introduced on remand does *not* show that the health of the broadcast industry as a whole is in danger." *Id.* at 48a-49a. The accuracy of appellees' concession was confirmed, in Judge Williams' view, by undisputed evidence concerning growth in broadcast advertising revenues (*id.* at 50a-55a), the number of broadcast stations (*id.* at 55a-59a), and broadcast profitability (*id.* at 59a-61a). Judge Williams accordingly discerned "insufficient evidence from which Congress could conclude that 'broadcast television is in jeopardy,' *Turner*, 114 S. Ct. at 2472, under any interpretation of that phrase consistent with the Court's analysis." J.S. App. 72a. Only if the Government's interest were redefined to focus, not on the broadcast system's overall health, but on "the maximum growth of broadcast, or enhancement of precisely the stations that would elect must-carry against the will of cable operators—interpretations of *Turner*'s mandate that are manifestly implausible—can the posited harms be viewed as real rather than conjectural." *Id.* at 72a-73a.[2]

Judge Williams took it as obvious—what appellants have of course never disputed—that, without the must-carry law, some stations have been (and would be) denied carriage, resulting in some potential lost audience and revenues. J.S. App. 61a-63a. He observed, however, that the evidence produced by both appellants and appellees

[2] Even on that level, Judge Williams noted evidence that "scarcely any of the 283 alleged victims has been seriously jeopardized by the absence of must-carry"—evidence that, in his view, would require a trial if that issue were relevant as a matter of law. J.S. App. 68a-69a. He concluded, however, that it was not. *Ibid.*

showed that these stations, separately and in the aggregate, account for a "diminutive share of total television viewing." *Id.* at 69a-70a. The evidence also showed that "if there is any pattern to carriage refusal, it is concentrated in the most crowded broadcast markets," so that "*those areas with the fewest broadcast stations have the greatest proportion of voluntary carriage and the least need for forced carriage.*" *Id.* at 71a-72a (emphasis in original). Judge Williams recounted: "[i]t is only those areas in which the airwaves are relatively busy—areas in which concern about the health of local broadcasting would be at a minimum—that cable carriage becomes an issue." *Id.* at 72a.

While finding the facts undisputed concerning the overall health of the broadcast system, Judge Williams acknowledged a distinct governmental interest in preventing even isolated instances of "unfair competition" by cable operators. J.S. App. 73a. He explained the numerous reasons casting doubt (or worse) on the Government's theories in this regard. *Id.* at 73a-88a. But if the "possibility of a risk of anticompetitive behavior" could not, "at least without trial," be precluded, Judge Williams concluded that appellants were nevertheless entitled to summary judgment because "must-carry is plainly not a remedy narrowly tailored to any such risk." *Id.* at 73a.

Exhaustively analyzing undisputed record evidence concerning "the actual effects of must-carry on the speech of cable operators and cable programmers" (*Turner*, 114 S. Ct. at 2472), Judge Williams first determined that "the harm from must-carry is substantial." J.S. App. 93a; *id.* at 90a-96a. According to appellees' evidence, "in 1993 must-carry stations *added* as a result of the Cable Act accounted for between 1.4% and 6% of the channels offered by sampled systems, and *total* must-carry stations accounted for between 7% and 13% of channels." *Id.* at 91a. Appellant Time Warner, for example, "added 240 broadcast stations to its systems because of must-carry and had to drop programming on 75 channels as a result." *Id.*

at 93a. Even the evidence focusing only on the 1992/1993 forced changes in channel occupation and availability, Judge Williams concluded, demonstrated "an obvious and direct burden on the First Amendment rights of both the programmers affected and the cable operator, who had freely contracted with the programmers to air their speech." *Ibid.*

With the impact on freedom of speech plainly substantial, Judge Williams concluded that undisputed evidence showed the existence of at least two "less restrictive alternatives" that would address the Government's legitimate concerns yet impose lesser burdens on other speakers' First Amendment rights—"genuinely non-discriminatory entitlements to carriage at regulated rates [and] the 'A/B' or input selector switch." J.S. App. 96a. Appellees' main objection to the A/B switch on a television (which allows viewers to switch from cable signals to signals from an over-the-air antenna) was that those consumers who lacked such a switch on their remote controls " 'had to get up' to change them" and thus found the switch "inconvenient." *Id.* at 106a. In Judge Williams' view, "government-mandated carriage seems a rather astonishing solution to a problem now redefined as consumers' occasional need to 'get up.' " *Ibid.*

Appellees opposed a requirement of *nondiscriminatory* access principally because broadcasters, like other programmers, would have to pay for such access. J.S. App. 100a. But if cable carriage "generates for broadcasters the enormous incremental revenues that defendants claim," and if the government interest is truly in creating the "standards of a free market," Judge Williams judged it "odd to find [broadcasters] disparaging the idea that they should pay any of the costs of access to this bonanza." *Id.* at 100a, 101a. And it was particularly so, given that "the salient difference between independent programmers and broadcasters is that the latter enjoy use of a valuable asset given them by the government—a broadcast license —that the former lack." *Id.* at 101a. Judge Williams

accordingly concluded that "must-carry violates the First Amendment requirement to use the least restrictive alternative, as that has been understood since *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), by adopting a mandate of completely *uncompensated* carriage in favor of a *privileged* class of users, at the expense of other speakers whose access to viewers is subject to *more severe* limits." *Id.* at 101a-102a (emphasis in original).

SUMMARY OF ARGUMENT

I. At the heart of this case lies a basic First Amendment principle: that, as a general rule, the government may not decree that certain speakers be heard and other speakers be silenced. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780-81 (1978); *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988). Targeted regulation that discriminates among speakers is presumptively unconstitutional, with the weight of the presumption depending upon whether the discrimination is content-based (subject to strict scrutiny) or, as here, content-neutral (subject to intermediate scrutiny). In either case, however, the government bears the burden of justifying its discriminatory regulation. The critical question in this case, therefore, is whether the Government has shown something about the need to discriminate between these particular speakers—broadcast stations (favored) and cable programmers (disfavored)—that would allow it to do what it ordinarily cannot. To that end, the Government has in the course of this case offered three principal reasons to support the discrimination of the must-carry law. None stands up to close scrutiny.

A. The first purported ground for discrimination is that forced carriage of broadcast stations is necessary to preserve the viability of the broadcast system as a whole. But, as the D.C. Circuit noted a decade ago, it is irrational to think that protection of each broadcast *station* is essential to protect the broadcast *system*. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985),

cert. denied, 476 U.S. 1169 (1986). Given the record in this case, the Government has now acknowledged, and Judge Sporkin himself recognized, that there is no basis in the evidence for concluding that the system *as a whole* is in any meaningful sense endangered. To the contrary, the facts demonstrate that the stations making up the vast bulk of the system are voluntarily carried anyway (often, today, pursuant to the retransmission consent provisions), and that the must-carry law serves primarily to assist little-watched stations in markets with unusually large numbers of broadcast stations. Enforced protection of these stations, however, has little to do with preservation of the historical broadcast *system*: it is simply an effort to insist that, regardless of interest, viewers in some communities must be offered many more broadcast stations than viewers in most communities can even get.

B. The second claimed ground for discrimination is that forced carriage of broadcast stations is necessary to overcome anticompetitive treatment by cable systems. But this argument—whether based on concern about vertical integration between cable operators and programmers or on concern about cable operators' supposedly dominant incentive to drop broadcast stations to injure them as competitors for advertising revenues (*see Findings* ¶¶ 15-16 (J.S. App. 116a-17a))—founders on an obvious inability to fit the law to the claimed interest. Thus, even if concern about vertical integration were actually a basis for the must-carry law, which it is not, the law is not remotely designed to address that particular concern. Other provisions of the Act explicitly address any problems arising from vertical integration, *see* 47 U.S.C. §§ 533(f)(1)(B), 536, 548(b) & (c), and the must-carry law, in any event, would be both a wildly overinclusive and underinclusive solution to those problems. It applies, on its face, to every cable system (regardless of whether it is vertically integrated) and to every decision about carriage of a broadcast station (regardless of whether it would favor a vertically integrated programmer). And the law provides mandatory access only to

unaffiliated broadcast stations, not to unaffiliated cable programmers.

The supposed concern about diversion of advertising revenues fares no better. Most notably, of course, the must-carry law is not directed at non-carriage *for that reason*: it prohibits non-carriage *for any reason*, including a desire to provide viewers with more attractive programming. Moreover, taking the argument on its own terms, the record again shows clearly that cable systems, regardless of any incentive to capture advertising revenues, willingly carry the vast majority of broadcast stations, including those that account for some 97-98 percent of viewership (and hence virtually all of the advertising revenues attracted by broadcast stations). Although the Government below tried to trim its theory, to argue that broadcast stations with the *least* advertising revenues are *most* at risk of anticompetitive actions, it utterly failed to show that this new-found theory is correct, even though its original theory (the theory set out in the congressional findings) has proved wrong. The record, in fact, provides no reasonable basis whatsoever for concluding that a desire to injure little-watched stations (or otherwise to divert advertising revenues), rather than a desire to provide attractive programming to subscribers, is behind most (or even many) carriage decisions made by cable operators.

C. The third and final interest—and the interest ultimately relied on by Judge Sporkin in upholding the law—is nothing more than an unadorned governmental desire to aid broadcast stations. But this is not at all what Congress said it was doing in 1992 or what this Court (or the Government previously) has understood the law to do. Furthermore, this interest—unless viewed as simply advancing a "more is better" principle—lacks internal coherence. Given that the number of local broadcast signals varies from community to community, the effect of the must-carry law is to require carriage of twelve broadcast stations in some areas, but only six broadcast stations in other areas. Yet, the Government has never explained why it is essential to some important govern-

mental interest that residents of one community *must* get twice as many stations as residents of a second community *can* get. Whatever might be the importance of assuring that viewers everywhere have access to a *minimum* number of broadcast outlets, there is no apparent reason why viewers in each community must have access to the *maximum* number of possible outlets, with that number changing from place to place.

The fragility of this interest does not mean that the Government is absolutely barred from making broadcasters a privileged class of speakers. It does mean, however, that the Government must choose different means more appropriate to such an end. If the Government wishes to provide benefits to certain broadcast stations, it may, for example, do what governments traditionally do: it may expend its own funds, thereby assuring that any stations in need remain available over-the-air to viewers in their community. What it may not do, however, is to impose its preference for certain speakers on the private marketplace by shutting out other speakers. Although the Government admittedly may prefer not to commit its own resources to assist broadcasters, the First Amendment does not allow it to say that it is willing to aid broadcast stations at the expense of cable operators and programmers, but not at its own expense.

II. The other principal argument pressed by the Government is that the law, in the end, really does not suppress much speech. The Court need not reach this question because the Government, by failing to fit the law to a genuine, important interest, has already failed the applicable intermediate-scrutiny test. A law that unnecessarily burdens speech cannot be rescued by asserting that the unnecessary burden is not all that burdensome. But, in any case, the assertion by the Government is wrong. Most subscribers are served by cable systems with no available capacity—a fact wholly ignored by Judge Sporkin—and the forced carriage of even one of two broadcast stations forecloses a significant amount of speech. On those channels, subscribers are completely

shut off from programming that, without government interference, they would be able to receive, while cable programmers, in turn, are completely shut off from reaching potential viewers. And First Amendment principles bar the Government from dismissing this obstruction merely by sayings that subscribers get enough speech from other programmers or that programmers have access to enough viewers in other places. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

ARGUMENT

The central issue in this case is whether the federal government, consistent with the First Amendment, may order cable systems to discriminate in favor of local broadcast stations at the expense of cable programmers. It is thus essential, at the outset, to recognize that this kind of forced discrimination is presumptively unconstitutional. As this Court has frequently observed, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. at 48-49. *See First National Bank of Boston v. Bellotti*, 435 U.S. at 780-81 (same); *Meyer v. Grant*, 486 U.S. at 426 n.7 (same); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295-96 (1981) (same); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 14 (1986) (plurality opinion) (same); *id.* at 24 (Marshall, J., concurring in judgment) (same). *See also San Francisco County Democratic Central Committee v. Eu*, 792 F.2d 802, 818 (9th Cir. 1986) ("[w]e must reject the argument that one person's First Amendment rights may be restricted in order to enhance the rights of another").[3]

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[3] As we discuss at pages 42-44, *infra*, government has a freer hand to make distinctions among speakers when it is managing its own funds or property. *See, e.g., Rosenberger v. Rector & Visitors of University of Virginia*, 115 S. Ct. 2510, 2518-19 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991). That is not the case here, however, and the Government does not contend otherwise.

The presumption against discrimination itself follows from the more general principle that " '[t]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.' " *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). It is thus well established that, even though government may believe that it can improve the marketplace for speech by dictating who can speak or what they can say, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. National Federation of the Blind*, 487 U.S. 781, 790-91 (1988). However well-meaning government regulation of speech appears to be, "the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression." *Turner*, 114 S. Ct. at 2480 (O'Connor, J., concurring in part and dissenting in part).

The presumption against discrimination is not absolute: as this Court noted in its previous review of this case, the presumption varies according to whether the discrimination is content-based or content-neutral. *See Turner*, 114 S. Ct. at 2466-67. In the former case, the discrimination is subject to the strictest scrutiny. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Even content-neutral discrimination, however, is subject to heightened scrutiny, *see Turner*, 114 S. Ct. at 2466-67, to reflect the fact that government is deliberately altering the private marketplace for speech.[4] In order to protect

[4] The need for more exacting scrutiny is especially important here because this is not a case in which the Government can claim to be pursuing an interest unrelated to speech itself. To the contrary, the law aids broadcasters, and inflicts substantial injury on cable programmers, with full knowledge that it is doing so. What the D.C. Circuit said of the earlier must-carry rules is likewise true of the present must-carry law: its "very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming

speech against unwarranted intrusion, the government must meet two substantial burdens: it must put forth an important government interest—a genuine interest, not merely a conjectural one (*Edenfield v. Fane*, 113 S. Ct. 1792, 1798-99 (1993))—and demonstrate that the regulation is, in fact, necessary to serve it. This Court, in turn, must exercise its "independent judgment" in order to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner*, 114 S. Ct. at 2471 (plurality opinion) (citing *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988)).

The plurality in *Turner* observed that "[i]n defending the factual necessity for must-carry, the Government relies in principal part on Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be 'seriously jeopardized.' " *Turner*, 114 S. Ct. at 2470. The court below did not find any genuine threat to the broadcast system as a whole (J.S. App. 8a-9a n.11), however, and the Government no longer makes any real effort to rely on that congressional finding. *See* J.S. App. 40a; Gov't Motion to Affirm 19, 25-26. As we discuss, its current defense rests on the quite different proposition that the law is needed simply to aid the most financially precarious stations. *See* pages 32-44, *infra*. Before turning to that discussion, however, we think it important to show the reason for this shift in approach: that, despite all its various theories and factual submissions, the Government simply cannot demonstrate a broadcast system in serious economic jeopardy, any more than it could in *Quincy* or in *Century*. To the contrary, the record makes clear that, even without the compulsion of a must-carry law (the situation from 1985 to 1992), any given cable system is likely to carry more

competitive advantage over cable programmers." *Quincy*, 768 F.2d at 1451. That specific "objective is a far cry from the sort of interests that typically have been viewed as imposing a merely 'incidental' burden on speech." *Id.*

local broadcast stations than were available during the long prior history of broadcast television. Nor, we note, can the Government demonstrate that the law is needed to prevent widespread anticompetitive conduct. Again, that interest is unsupported by the record, and the law is plainly not tailored to fit it.

I. THE MUST-CARRY LAW IS NOT NECESSARY TO ASSURE THE ECONOMIC VIABILITY OF THE BROADCAST SYSTEM AS A WHOLE

A. It is true, of course, that each broadcast station is, in a literal sense, part of the broadcast system. But it does not follow that carriage of each station is necessary to protect "the economic health of local broadcasting." *Turner*, 114 S. Ct. at 2470 (plurality opinion). To determine whether that larger interest is at risk, it is necessary to look more closely at what stations are likely to be carried voluntarily and what stations might not be carried. Those facts are not materially in dispute: virtually the only stations at any risk of non-carriage (apart from duplicative stations, which are broadly ineligible for must-carry protection) are little-watched stations in markets with an unusually high number of licensed broadcast stations. *See* J.S. App. 69a-70a, 71a-72a, 83a (Williams, J., dissenting).

Neither Judge Sporkin nor Judge Jackson did, or could, take issue with these basic facts; indeed, as the Government and its expert Dr. Noll observed below, the parties "'are in relatively close agreement about the facts.'" *See* Gov't Opp. Mem. 11 (quoting Noll Rebuttal Decl. ¶ 6 (J.A. 1791)). The evidence showed that, during the non-must-carry era of 1985-1992, "the average cable subscriber was served by a cable system carrying local broadcast stations accounting for about 97% of television ratings in non-cable households." J.S. App. 69a (citing Besen Decl. 41 (J.A. 808)). These stations included virtually every station with measurable viewership, *plus* a third or so of stations with *no* measurable viewership; and in terms of sheer numbers of stations (disregarding viewership), "the typical [cable] subscriber had access to 81

percent of all local stations, including 99 percent of all local network affiliates, 98 percent of all local Fox affiliates, and 98 percent of VHF independent stations" as well as "61 percent of UHF independent stations and 78 percent of non-commercial stations." Third Besen Decl. 1, 19 (footnote omitted) (J.A. 2027, 2042); Besen Decl. 41-42 (J.A. 808-09). Although appellees "bristle at th[e precise] statistic" showing that "what is at stake without must-carry is a diminutive share of total television viewing," they have "offer[ed] no alternative figure," and their own evidence and argument confirms the fundamental point. J.S. App. 70a; *id.* at 69a-70a. Moreover, this picture is wholly consistent with the 1988 FCC Carriage Study (and the other available industry studies), as the 1991 analysis by the Federal Trade Commission staff confirmed. *See* J.A. 36-64, 157-85.

This evidence does not show "significant numbers" of broadcast stations going uncarried. *See Turner*, 114 S. Ct. at 2469. Although it is true, as Judge Sporkin noted (J.S. App. 11a), that hundreds of stations had been dropped or denied carriage, that fact does not come close to indicating that the broadcast system is in real jeopardy. In the first place, it says nothing about whether a particular station was subject to non-carriage on any more than a single cable system among the 50 systems in the average local market. *See* J.S. App. 43a n.1 (Williams, J., dissenting). *See also* Third Besen Decl. 19-21 (J.A. 2042-43). Moreover, it gives significance to the numerator of a fraction without regard to the denominator: given that there are more than 11,000 cable systems nationwide and that each system carries numerous broadcast stations, it is obvious that even minimal instances of non-carriage will amount to absolute numbers in the hundreds or even thousands.[5] And, of course, a focus on the

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[5] *Cable* programmers likewise are dropped as cable systems, over time, will continue to make changes in the mix of programming offered to their subscribers. *See* Ellis Suppl. Aff. ¶ 5 (J.A. 1766-67). These alterations are likely to be especially frequent as the supply of available programming greatly increases, allowing sys-

number of uncarried stations wholly ignores the critical question of *viewership*; the economic health of the system as a whole is hardly in peril when 97-98% of local over-the-air viewing is voluntarily carried on the average subscriber's cable system.[6]

It is also important to consider the distribution of stations not carried. As Judge Williams pointed out (J.S. App. 71a-72a), the failure of Judge Sporkin to do so is especially serious because the number of broadcast stations varies greatly from community to community. Thus, while a cable system carrying 15 out of 20 broadcast stations is not carrying 5 stations (25% of the total), it is carrying 8 to 10 more stations than are on the air in most communities; even without the compulsion of the must-carry law, the viewers in such a broadcast-rich community already will have far more choices among broadcast stations than viewers nationwide. And, in markets with so many choices, it is natural to expect that some broadcast stations will attract very little audience. It is not surprising, therefore, to find (from appellants' *and* appellees' evidence) that the broadcast stations not carried are in fact predominantly those with extremely low viewership in communities with an exceptionally high number of broadcast stations. *See* J.S. App. 72a; Third Besen Decl. 18, 20 n.28 (J.A. 2041-43); Dertouzous Rebuttal Decl. ¶¶ 16, 17 & Table A-3 (J.A. 1902, 1905).[7]

tems to provide new and different sources of programming. There is no reason to think that broadcast programming alone is replaced, and, in fact, it is not.

[6] Disregarding viewership undermines any effort to treat the must-carry law as "industry-specific antitrust" legislation. *Turner*, 819 F. Supp. at 40. A market in which 97-98% of output (sold by numerous firms) is concededly unthreatened is not a "market in dysfunction" in any familiar sense, regardless of how many firms supply the remaining 2-3%. *See generally* Third Besen Decl. (J.A. 2027-51). Any effort to think about the must-carry law in terms of competition, or economic value, cannot ignore the (tiny) viewership of the stations not carried.

[7] Although the Government has frequently pointed out that the law dictates programming on no more than one-third of the chan-

The must-carry law thus suffers from the same defects as the prior must-carry rules. The Court of Appeals in *Quincy* noted that, as a means of "preserv[ing] 'localism' and not 'local broadcasters,'" the prior rules were "'grossly' overinclusive." 768 F.2d at 1460. The Court observed that "[t]he rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator." *Ibid.* Pointing out that "[t]he 18th station is entitled to carriage no less than the first" (*ibid.*), the Court went on to state that "[i]t is not the fact of the 18th station that is troubling, but the fact that it is [effectively] guaranteed a channel even if carriage effectively bumps a cable programmer, regardless of the extent it impinges on the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preferences." *Id.* at 1461.

The same is true here. Although Congress expressed concern about the "economic viability of free local broadcast television" (*Findings* ¶ 16; J.S. App. 117a), that finding does not equate to an expression of concern about the financial condition of each broadcast station. Indeed, as long as the local cable system provides virtually all of the programming regularly watched by viewers, then the local broadcast system in that particular community is in no meaningful sense in serious jeopardy. The law here does not protect (and is not needed to protect) viewers from being denied programming of widespread interest to them; rather, it is simply a boost to marginal stations in

nels on a cable system, it cannot seriously argue that, unless a cable system devotes one-third of its channels to broadcast stations, the broadcast system in that community is in real jeopardy. The important variables are the number of stations carried and the viewership accounted for by those stations, *not* the overall capacity of the cable system. Indeed, by the terms of the must-carry law, a cable system must add certain qualifying *low-power stations* to meet its obligations, 47 U.S.C. § 534(c), even though access to these stations has never been thought essential to preserving the economic health of the broadcast system.

communities that already have an unusually high amount of broadcast programming. As we discuss later, *see* pages 32-44, *infra*, that narrow interest simply does not support a law imposing so great a restriction on freedom of speech.

B. The evidence with respect to voluntary carriage also defeats any claim that the must-carry law is needed to protect the historical broadcasting system from the effects of a new medium. While exit and entry will occur in any competitive market, the fact is that the period from 1985 to 1992 (the period without must-carry obligations) saw a very small number of stations go "dark." *See* J.S. App. 56a (Williams, J., dissenting) ("defendants have conceded their inability to show that *any* station, commercial or public, turned in its license in the period without must-carry"). It was marked instead by a very substantial *increase* in numbers of stations, overall and in virtually every market. *See* J.S. App. 56a-58a, 72a (Williams, J., dissenting). Indeed, this sharp growth during the extended period without any must-carry law, together with the high rates of voluntary carriage, makes clear that the growth of cable television (without must-carry), far from *harming* the broadcast system, " 'made possible the expansion in the number of broadcast television stations by increasing the potential audience of UHF stations.' " Gov't Opp. Mem. 47; *see* J.S. App. 64a (Williams, J., dissenting).

The undisputed facts thus show that the must-carry law is in no way needed to *protect* the preexisting broadcast system from *worsening* at the hands of cable.[8] The proposition that the Government must defend, therefore, is that the law is needed—for some unexpressed reason—to stimulate even greater expansion of the system. But any such defense would be at odds with the findings set out by Congress. In those findings, Congress explicitly expressed its concern about the possibility of harm to the broadcast system. *See, e.g., Findings* ¶¶ 12, 15, 16 (J.S. App. 116a-17a). Similarly, the legislative history expresses concern about feared "erosion of the local broadcast system." Sen. Rep. No. 92, 102d Cong., 1st Sess. 60 (1991); *see* H.R. Rep. No. 628, 102d Cong., 2d Sess. 65 (1992). At no point, however, did Congress seek to justify the law as a means of *enhancing* the broadcast system. As this Court has already observed, "the provisions are designed to guarantee the *survival of a medium* that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming." *Turner*, 114 S. Ct. at 2461 (emphasis added).

[8] Although the Government below pointed to a slowdown in the rate of growth, it acknowledged that the system of broadcasting significantly expanded in 1985-1992. *See* Gov't Opp. Mem. 49. And, in any event, as Judge Williams explained (J.S. App. 57a-61a), there is no reliable basis for the attribution of the slowdown in the rate of growth to the absence of must-carry—particularly given that the rate has slowed further since 1992 and that there was an FCC license freeze in 1987. *See also* Third Besen Decl. 27 (J.A. 2048-49).

A justification based on *expansion of* the preexisting broadcast system, in fact, would stand on a very different (and considerably weaker) footing than one based on likely *harm to* that system. In noting that the latter interest was a substantial one, the Court in *Turner* noted that the local broadcast system, since its inception more than six decades ago, has been " 'a principal source of information and entertainment for a great part of the Nation's population.' " 114 S. Ct. at 2469 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). The Court then went on to observe: "The interest in *maintaining* the local broadcast structure does not evaporate simply because cable has come upon the scene." 114 S. Ct. at 2469 (emphasis added). But it is one thing to say that government may protect broadcast stations from harm caused by the advent of a new medium, quite another to allow government to limit the speech of new speakers in order to expand the speech of existing speakers. There is a far less defensible interest in demanding that a designated class of speakers have *more* speech than it had before.

II. THE MUST-CARRY LAW IS NOT NECESSARY TO PROTECT AGAINST WIDESPREAD ANTICOMPETITIVE ACTIONS AGAINST LOCAL BROADCAST STATIONS

Although Judge Sporkin suggested that cable systems would refuse to carry broadcast stations for anticompetitive reasons (J.S. App. 8a-14a), the must-carry law cannot be sustained on that basis. Whether the concern is over vertical integration of cable operators and cable programmers, or over efforts by cable operators to injure potential competitors for advertising revenues, a law barring *any* cable operator from declining to carry essentially *any* local broadcast station for *any* reason—including the desire to carry cable programming of greater interest to its subscribers—is an impermissible means of addressing any such interest.

A. The lack of fit between the law and any interest in protecting against anticompetitive activity is readily seen with respect to any concern about vertical integration between cable operators and programmers. Judge Sporkin noted the fact that some vertical integration exists (J.S. App. 8a), but he made no effort to assess whether the law was tailored to *that* interest. Had he made such an inquiry, he would first have had to come to grips with the fact that vertical integration is dealt with in *separate* provisions of the 1992 Cable Act. *See* 47 U.S.C. §§ 533 (f)(1)(B), 536, 548(b) & (c). Those provisions, with their implementing regulations, limit operators to specified capacity that may be filled with programming in which they have an interest, bar certain exclusive distribution agreements and discrimination against non-integrated programmers, and prohibit various unfair competitive practices by integrated cable programmers and operators. *See* Second Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 95-61, ¶¶ 157-172 (Dec. 11, 1995). Judge Sporkin utterly failed to explain why, despite those targeted restrictions, Congress would have thought that the must-carry law—which, of course, makes

no reference, by its terms, to vertical integration at all—was needed to address some (undefined) problem still to be solved. *Cf. McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1520-21 & n.12 (1995) (government interest in challenged statute is weakened by fact that the same interest is already directly attacked by another statute).

It is also self-evident that the must-carry law is not in any way tailored to a problem with vertical integration. Although Congress expressed concern that "cable operators have the incentive and ability to favor their affiliated programmers" (*Findings* ¶ 5 (J.S. App. 114a)), and that "[t]his could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems" (*ibid.*), the provisions of the must-carry law do not fit with either concern. As to the first, the law applies to every cable system, regardless of whether it is vertically integrated with any programmer, and it applies to every decision to carry a cable programmer rather than a broadcast station, regardless of whether that programmer is vertically integrated with the system. As to the second, the law benefits only unaffiliated broadcast stations, and not unaffiliated cable programmers. The law is thus both overinclusive and underinclusive.

The problem, to the extent there is a problem, is also somewhat of the Government's own making. There is nothing inherently wrong with vertical integration; with respect to the cable industry in particular, it has stimulated the production of great quantities of valuable information and entertainment. *Report and Order*, 8 F.C.C.R. 6828, 6860 (1993). The federal government, however, has prohibited cable systems from owning local broadcast stations. 47 U.S.C. § 533(a). To the extent that this prohibition adversely affects carriage of broadcast stations—a doubtful proposition, anyway, since cable systems carry most stations—the Government can repeal the law and treat broadcast stations and cable programmers alike.

B.1. The interest in protecting against anticompetitive actions aimed at diverting advertising revenues suffers from

similar problems. At the outset, it is not at all clear that Congress regarded this interest as a stand-alone basis for the statute, rather than as part of its concern that the economic viability of the broadcast system as a whole would be jeopardized: in its findings, Congress seemed to tie the two ideas together, stating that cable systems and broadcast stations are horizontal competitors for local advertising revenues and that, by denying carriage to stations, cable systems would put local broadcasting in serious peril. *Findings* ¶¶ 14-16 (J.S. App. 116a-17a). *But see Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2349 (1995) (noting "interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed"). But, however viewed, the theory is plainly insufficient: the law is not directed simply to anticompetitive decisions but to *any* decision not to carry a broadcast station for *any* reason.

The must-carry law, on its face, makes clear that it is not tailored to any problem of anticompetitive actions by cable systems. By its terms, the law basically prohibits the dropping of broadcast stations for *any* reason, including an attempt to provide programming of greater interest to subscribers. A cable system cannot defend against the law by showing that it carries the stations of greatest interest in the community, or that the station to be dropped has no measurable following in the community, or that the system has no rational economic interest in dropping the station to better its position in the local advertising market. The law, while purporting to be based on concern about the effects of anticompetitive behavior on the health of the broadcast system, applies without regard to any of these factors. Thus, taken at face value, it is a classic example of an unnecessarily broad law.

The Government might conceivably be able to save the law, despite its breadth, by showing that decisions about non-carriage are so commonly made for anticompetitive reasons that a blanket rule would not be ill-fitting. But,

in assessing any such defense, it is important to define the proper inquiry. To support the must-carry law, it would not be enough for the Government to show that cable systems *sometimes* drop broadcast stations for anticompetitive reasons. Because the law applies to *every* decision about carriage of a station electing must-carry rights, the Government must demonstrate that, in the absence of must-carry requirements, *most* of those decisions are made for anticompetitive reasons. *See Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (scope of law must be "in proportion to the interest served") (internal quotes omitted). The fit need not necessarily be perfect—as it might have to be under strict scrutiny—but it must be a close one. *Ibid.*

The fit here is anything but close. The starting point, of course, is that the principal theory is absolutely wrong most of the time. Although Judge Sporkin made various references to the market power of cable systems and their incentives to abuse it (*see* J.S. App. 7a-14a), he made no attempt to deal with the undeniable fact cable systems voluntarily carry the vast majority of broadcast stations and virtually all stations with measurable viewership (and thus able to attract advertising revenues). If those figures are taken into account, however, it is simply not possible to conclude that cable systems are abusing (if they have it at all) the "monopolistic opportunity to shut out some speakers." *Hurley*, 115 S. Ct. at 2349.[9]

It is also clear that Congress fully expected the pattern of voluntary carriage to continue. The 1992 Cable Act, far from indicating special concern about carriage of the popular stations, effectively gave those stations the lever-

[9] As we have noted, broadcast stations proliferated in the absence of must-carry requirements. *See* page 22, *supra*. That increase indicates either that transmission by cable systems is not essential to broadcast stations' success or that cable systems are willingly carrying most of them. *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.2d, at 650-51 (1995 Supp.). Both, in fact, are likely true, but, as noted in the text, the second certainly is.

age to *refuse* carriage in the absence of satisfactory compensation. *See* 47 U.S.C. § 325(b). The so-called retransmission consent provisions thus leave carriage of electing stations to the marketplace, relying on the expectation that the desire to offer programming of interest would take priority over any "economic incentive" to injure competitors for local advertising revenues. And that is precisely what has happened for *most* broadcast stations: "cable operators carry the vast majority of channels eligible for must-carry through retransmission consent." Gov't Mem. 134; Jt. Stip. Facts ¶¶ 120, 121.

These facts—essentially undisputed—are critical. For, once it is recognized that cable systems voluntarily carry (even pay compensation to carry) their significant broadcast competitors, the theory of pervasive anticompetitive bias against broadcast stations—*as broadcast stations*—largely falls apart. In fact, as we have said, the stations voluntarily carried accounted for 97-98% of all over-the-air local viewership. Since viewership is directly correlated with advertising revenues, the record demonstrates beyond genuine argument that, wholly without regard to legal mandates, cable systems willingly carry the stations representing virtually the entirety of the local TV advertising revenues that the systems would allegedly attempt to obtain by denying carriage. The staff of the Federal Trade Commission, in fact, came to the same conclusion. Noting the extremely low levels of viewership of commercial stations denied carriage, the staff found that evidence in the 1988 FCC study (and other studies) "would suggest generally that non-carriage decisions have not been motivated by anticompetitive considerations, such as the acquisition of market power in advertising markets." 1991 FTC Staff Report ii (Executive Summary) (J.A. 161). Given the low audience support for most stations refused carriage, the FTC analysis pointed out, sensibly enough, that "[d]enying carriage to stations that viewers seldom watch is not a promising anticompetitive strategy for reducing advertising output." *Id.* at 24-25 (J.A. 181).

2. Faced with these facts, the Government below made some attempt to scale back its theory, arguing that the least popular stations are *most* at risk of anticompetitive actions. The first problem, of course, is that the foundation of this new argument—that less popular stations are the ones not carried—fits most naturally with *our* view of the case: that decisions are made not for anticompetitive reasons but to meet the interests of subscribers. If that is the case, it is precisely those decisions that the First Amendment should protect from government interference. *United States v. National Treasury Employees Union,* 115 S. Ct. 1003, 1015 (1995) (restrictions on speech restrict rights of potential listeners).

The next problem is that the Government (and the public television stations) put noncommercial stations, along with some UHF stations, in this most endangered category. But the theory of diverting advertising revenues does not apply at all to noncommercial stations, which do not carry local advertising. This point is a telling one: by definition, decisions not to carry noncommercial stations must be based on something *other than* an intent to injure them as horizontal competitors for advertising revenues. That being so, however, there is no reason to attribute a different motivation to cable systems when they make decisions about carriage of little-watched *commercial* stations.

Finally, the new government theory is, at best, nothing more than fanciful speculation. We know from the record that—in the great majority of cases—the desire to carry programming of value to subscribers *outweighs* any desire to injure broadcast competitors for advertising revenues, resulting in widespread carriage of the most significant competitors. Even though the Government would like to suggest that, at some undefined point, the incentives reverse, it provides no sound basis to think so. It is correct, of course, that cable subscribers have less interest in little-watched stations—and, therefore, are less likely to react adversely to decisions not to carry them—but reliance on that fact does not prove the point for at least two reasons: first, it is just another way of saying that the speech is not

of any real value to subscribers (an observation that strongly supports our position); and, second, it takes no account of the fact that, as the level of subscriber interest in a particular station declines, so do the advertising revenues affected by a decision not to carry it. *See* Third Besen Decl. 6-9 (J.A. 2031-34). Nothing in the record, therefore, supports the notion that the "advertising" incentive *ever* outweighs the "subscriber" incentive.

That speculation, in fact, is quite implausible. Not only are the advertising revenues of little-watched stations obviously very small (*see* Third Besen Decl. 9 (J.A. 2033-34), but the likelihood that they will be captured by the local cable operator, rather than by other sellers of television advertising time, is smaller still. *See ibid.* As the FTC staff observed, in light of the fact (now as then) that cable systems account for only a small fraction of video advertising revenues, "even if denial of cable carriage to some stations could result in a monopolistic reduction in the quantity of advertising time, the principal beneficiaries of this reduction would be other broadcasters, which continue to produce most of the output in this market." FTC Staff Report at 20 (J.A. 176). *See* Besen Decl. 23 (cable operators' advertising revenues are roughly 6 percent of local broadcasters' advertising revenues) (J.A. 793). If the First Amendment burden of proof means anything it must mean that the Government cannot do what it is trying to do here: simply hypothesize the decisive weight of an economic incentive that has been proved insignificant in the only realm (the market as a whole) where it has been empirically tested.

3. The Government, at times, has seemed to be making a second argument with respect to cable systems and advertising revenues: that cable systems will drop broadcast stations because, unlike cable programming networks, they do not provide cable systems with local advertising slots ("ad avails"). *See, e.g.*, Gov't Mem. 55. This theory suffers from some of the same defects as its principal theory, and some added ones as well.

The first difficulty with this theory as a defense of the must-carry law is that it is decidedly *not* the theory relied on by Congress in enacting the law. The findings set forth by Congress make very clear its concern: that cable systems will refuse carriage to broadcast stations to keep them from "attract[ing] additional advertising revenues that otherwise might be earned by the cable system operator." *Findings* ¶ 15 (J.S. App. 116a-17a). Because "[a] cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership" (*ibid.*)—and thereby its ability to sell advertising—the system has an "economic incentive" to diminish the potential audience of its broadcast competitor. It is that "economic incentive," and the actions thought likely to flow from it, that supposedly put the broadcast system in serious jeopardy. *Findings* ¶ 16 (J.S. App. 117a).

The theory based on "ad avails" is completely different. It does not turn upon the possibility that cable systems will engage in anticompetitive actions against their own (horizontal) competitors for the sale of time to advertisers. Rather, it depends upon the notion that cable systems, in selecting among various *suppliers, i.e.*, the participants in the programming market, will favor those programmers offering slots that the operators may then turn around and market to local advertisers. Nothing in the congressional findings suggests that any such practice would gravely injure the broadcast system. And, even if that suggestion were present, it would be unpersuasive because this theory, like the original advertising theory, is wholly one-sided. The benefit of obtaining "ad avails" is itself only one of a number of factors to be considered by a cable system in determining its programming choices: it must be weighed against the loss of customer satisfaction if programming of lesser interest is offered instead.

The facts regarding carriage, once again, show how this balancing ultimately comes out: cable systems, regardless of the lack of "ad avails," carry the vast majority

of broadcast stations and virtually all stations with positive viewership, representing 97-98% of noncable viewing. And while some cable systems, without the must-carry law, plainly would choose not to carry some little-watched stations (hence this litigation), the fact remains that cable systems carry a high proportion of even those stations. *See* Besen Decl. 42 (almost one-third of stations with *no* measurable viewership among non-cable households—a rating of less than one-tenth of one percent—were carried by cable systems voluntarily) (J.A. 808-09). Finally, to the extent that broadcast stations are at any disadvantage in securing carriage, it is a disadvantage of Congress's own making. Broadcast stations, like cable programmers, could provide "ad avails" except for the fact that Congress has required cable systems to run broadcast signals without alteration. 47 U.S.C. § 534 (b)(3); *see also* 17 U.S.C. § 111(c)(3). It gets matters backwards to say that Congress, having put broadcast stations at this disadvantage, can then seize on the disadvantage as a ground for suppressing the speech of other programmers. If the "ad avail" problem were truly Congress's concern, a less restrictive alternative obviously would be to lift the congressionally imposed restriction applicable to broadcast stations.

III. THE MUST-CARRY LAW CANNOT BE JUSTIFIED AS MANDATORY ASSISTANCE FOR LITTLE-WATCHED, FINANCIALLY PRECARIOUS STATIONS

As we have discussed, Judge Sporkin did not find, and could not find, that the must-carry law is necessary to preserve the economic viability of local broadcasting as a whole. Nor did he, or could he, find the law tailored to anticompetitive concerns. In the end, therefore, Judge Sporkin looked merely to whether the law was justified as a means of advancing the "health of those broadcasters protected by the must-carry provisions." J.S. App. 8a-9a n.11. But reliance on this new-found interest would reflect the very bootstrapping tactic condemned by this Court as a "circular defense" in *Simon & Schuster, Inc. v. Members*

of New York State Crime Victims Bd., 502 U.S. 105, 120 (1991), *i.e.*, "tak[ing] the *effect* of the statute and posit-[ing] it as the [governmental] interest." In any event, this interest is not enough to prop up the law.

A. The attempt to frame the justification of the must-carry law as simple protection of marginal, little-watched broadcast stations is immediately cast into doubt by the history of this litigation, set against the background of the earlier must-carry cases. The D.C. Circuit in *Quincy* concluded, as a central part of its rationale, that protection of individual broadcast stations would *not* be an adequate justification for imposing broad must-carry obligations. *Quincy*, 768 F.2d at 1460. The Court found a "critical" distinction between laws protecting "local broadcast*ing*" and laws protecting "local broadcast*ers*" and observed that the Commission had disclaimed an intent to protect broadcasters, but sought only to protect the system. *Id.* The Court added: "Indeed, were the individual broadcasters themselves the object of the Commission's favors, the objective itself would be fundamentally illegitimate." *Id.*

There is no evidence whatsoever that, in enacting the 1992 must-carry law, Congress intended to pursue the very goal that the Court in *Quincy* had deemed "fundamentally illegitimate." To the contrary, protection of the health of the broadcast system, supposedly threatened by anticompetitive conduct, is the explicit basis for the law set forth by Congress in its findings.[10] Indeed, Congress

[10] In defending a law subject to heightened scrutiny, the Government must rely on an interest that *Congress* intended to advance, not simply one invented for purposes of litigation. *See Edenfield v. Fane*, 113 S. Ct. at 1798; *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *see also Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376-77 (1995). In *Mississippi University for Women*, for example, the Court struck down a discriminatory law—despite a defense that it was intended to serve a "benign, compensatory purpose" (458 U.S. at 730 (internal quotes omitted)) —holding that the State had "failed to establish that the alleged objective is the *actual purpose* underlying the discriminatory classification." *Ibid.* (emphasis added).

rested the must-carry law on a specific prediction: that "[a]s a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals . . ., the economic viability of free local broadcast *television* and *its* ability to originate quality local programming will be seriously jeopardized." *Findings* ¶ 16 (emphasis added) (J.S. App. 117a). In contrast to this straightforward (though misguided) declaration, Congress made no reference in its findings to mere protection of individual, weak stations.

The congressional committees also made clear that they were seeking to protect the *system* of broadcasting, not individual stations, and to promote legitimate competition, not protect against it. *See* Sen. Rep. 92, 102d Cong., 1st Sess. 36 (1991) (intent is "to ensure that our system of free broadcasting remain vibrant"); *id.* at 42 ("absent legislative action, the free local off-air broadcast system is endangered"), 54 ("create a competitive balance between the cable and broadcast industries"), 55 ("designed to promote competition"; "harm [to] the system"), 59 ("promotion of competition"), 60 ("we need not wait until widespread further harm has occurred to the system of local broadcasting or to competition in the video market before taking action to forestall such consequences"); H.R. Rep. No. 628, 102d Cong., 2d Sess. 51 (1992) (absence of must-carry "will result in a weakening of the over-the-air television industry and a reduction in competition, thereby depriving the public of those benefits"); *id.* at 57 ("competition is healthy"), 63 ("promotion of competition"), 64 ("the system of free local broadcasting"), 65 (same statement as in Sen. Rep. No. 92, at 60, regarding waiting for further harm; "erosion of the local broadcast system has already occurred" and law needed "to preserve the values served by the local broadcast system"). Thus, the committees' statements of purpose, involving preservation of "local television service" and "promotion of fair competition" (Sen. Rep. No. 92, at 58; *see* H.R. Rep. No. 628, at 63), speak to systemic, procompetitive interests, not protectionism for individual stations. And, strikingly, despite their extensive discussions of *Quincy* and *Century*, the congressional committees nowhere repudiated the "critical" distinction between broadcast*ing* and broadcast*ers* or asserted that they were now seeking to protect the latter. *See* Sen. Rep. No. 92, at 53-62; H.R. Rep. No. 628, at 58-67.

The structure of the must-carry law itself reinforces the conclusion that protectionism for the weakest stations was not intended. Most obviously, the law does *not* protect marginal stations against being left out when there are more local stations in a community than a cable system must carry (pursuant to the one-third limit). If Congress had meant to protect the marginal stations, rather than the system itself, it would have been natural to give them priority over the more prosperous stations (like network affiliates), but it did not do so. Furthermore, in counting stations for purposes of must-carry, cable systems may include all stations carried pursuant to the retransmission consent provisions, overwhelmingly the strongest stations. Even more striking, cable systems may count carriage of *duplicate network affiliates*—so that a system may carry two affiliates of the same network, even though that decision leads to non-carriage of a financially precarious station. *See* 47 U.S.C. § 534(b)(5); 47 C.F.R. §§ 76.55, 76.56. In short, the law is not designed to advance the interests of individual broadcast stations, rather than the interest of local broadcasting as a whole, and could not be so interpreted without turning the pro-competition policy of the Act on its head.

To read the 1992 Act as designed to protect individual broadcasters against legitimate competition is thus unsupported by, and indeed antithetical to, what Congress said it was trying to do in 1992. Such a reading also would mean that Congress was taking the unexpected action of sharply repudiating a 50-year-old policy of the Communications Act, which states that it is aimed at providing a "fair, efficient, and equitable" broadcast system. 47 U.S.C. § 307(b). In 1940, this Court in *FCC v. Sanders*

Bros. Radio Station, 309 U.S. 470, explained in the clearest terms:

> it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

Id. at 475. Congress did not turn its back on this longstanding free-market policy and declare a new policy of protectionism. Rather, its findings pointedly reinvoke the policy of Section 307(b) (*Findings* ¶ 9 (J.S. App. 115a)), and its statement of policy declares its objective to "rely on the marketplace, to the maximum extent feasible" (1992 Act § 2(b)(2); J.S. App. 118a).

It is thus hardly surprising that, when the Government defended the 1992 Act before this Court, it stressed, as a substantial governmental interest, the need to protect the economic viability of the broadcast system (not of individual stations). *See* U.S. Br. at 15 (law needed to ensure "a vital broadcast market"); *id.* at 39 (government interests "in addressing unfair competition in the video communications market and in preserving the local broadcast industry"); *id.* at 40 n.27 ("government interest in preserving local broadcasting"). And it is plainly that interest that this Court found to be substantial. In its opinion, the Court specifically said that "the provisions are designed to guarantee the survival of a *medium*" (*Turner*, 114 S. Ct. at 2461 (emphasis added)) and that "Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television *industry* is in economic peril" (*id.* at 2467 (emphasis added)); *see also id.* at 2470, 2471 (plurality opinion) (Government must show that "the economic health of local broadcast*ing* is in genuine jeopardy" and that "the must-carry rules are necessary to protect the viability of broadcast *television*"). And, in requiring government proof that "significant numbers" of stations will be refused carriage without a must-carry law (*id.* at 2471), the plurality confirmed that the interest at stake was in protecting against a threat to the *system*: if the law was defensible as protection for each and every station, the inquiry into "significant numbers" would hardly be needed. It is only the notion of the broadcasting system that gives any context to determine when the number of affected stations is "significant."

B. The assertion of an interest in promoting individual stations for their own sake also raises additional problems under the First Amendment. Whatever the asserted interest, of course, the must-carry law compels discrimination: it suppresses the speech of cable programmers and advances the speech of local broadcast stations. But, viewed as a means to preserve the broadcast system, this discrimination at least would act (if justified) as something more than a naked preference for certain programmers, assuring that the emergence of one medium of speech does not critically harm another, longstanding medium. As an end in itself, by contrast, the discrimination does nothing other than declare that the speech of broadcast stations is—in the eyes of the Government—more important than the speech of cable programmers. It is that sort of judgment that government is generally not free to make.[11]

A law that favors certain speakers as an end in itself also raises more substantial risks that the (undisclosed) motivation for the discrimination is a preference for what the favored speakers will say. Although discrimination by class reduces that risk somewhat (and thus allows for less strict, though still heightened, review), *see Turner*, 114 S. Ct. at 2467-69, it is not implausible to think that government officials, in deciding to prefer one category of speakers (broadcast stations) over another (cable programmers), will be influenced by opinions about the programming that they offer. And, even if government

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[11] The balance of interests might be different if the Government were using its own funds or property, but it is not. *See* pages 42-44, *infra*.

officials can set aside their preferences for certain types of programming, their ability to distort the marketplace for speech necessarily forces competing speakers to seek government approval in order to gain favor or avoid disfavor. Given the dangers to speech posed by discrimination, therefore, it is important that its use by government typically be restricted to those circumstances in which it serves some substantial interest *broader than* pure preference for particular speakers.

This principle does not change merely because some speakers (the ones that government seeks to favor) offer their speech free of charge. To suggest otherwise, in fact, is to confuse "free speech" with "freedom of speech." While it is true that broadcast stations offer free programming, that fact does not mean that the programming is—or should be—considered of greater value to the public. It seems quite clear, for example, that government could not order newspapers to set aside pages for authors that were willing to provide articles without charge, or private theatres to devote one day a week to works by playwrights willing to forego any charge for admission. *See generally Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Even if that were not so as a general matter, however, it should be so here. The fact is that broadcast stations can provide free over-the-air programming for one, and only one, reason: the Government has given them valuable licenses to distribute that programming over the electromagnetic spectrum. It has long been recognized that this grant of licenses provides the basis for the Government to impose greater restrictions *on local broadcasters*. *See Turner*, 114 S. Ct. at 2456; *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984). But it would turn First Amendment law inside-out to hold that the licenses allow the Government to impose greater restrictions *on other speakers*, in order to assist still further those receiving the licenses in the first place.

It would thus pile discrimination upon discrimination to say that the Government, *because* it has given broadcast stations exclusive access to over-the-air viewers, may now give them preferential access to cable viewers as well. Unlike broadcast licensees, cable programmers lack their own means of distribution to use if they are edged out of access to cable viewers through a cable system. Indeed, it was the development of cable television that allowed these new programmers—which are responsible for an extraordinary increase in the amount of available speech—to exist at all. It would be utterly perverse now to declare that their potential access to that audience should be narrowed (and, in concrete cases, shut off entirely) in order to favor programmers with unchallenged access to the rest of the community.

C. The interest in protecting each and every broadcast station, for its own sake, is also largely divorced from any intelligible concept of local broadcasting. Because the number of broadcast stations varies from community to community, the interest becomes nothing more than a floating interest in promoting the greatest possible number of broadcast outlets, without being tied to any coherent view about the needs of television viewers. Yet it is the interests of the viewing public, not the broadcasters themselves, that Congress ostensibly aimed to protect. *See Findings* ¶¶ 6, 11, 17, 19 (J.S. App. 114a, 116a-18a).

This lack of coherence can be readily seen by comparing two communities—one with six local broadcast stations, the other with twelve. If we assume, consistent with the evidence, that the cable system in the latter community voluntarily would carry at least ten of the available stations, it is clear that viewers in that area already will have substantially *more* broadcast programming than viewers in the first area. What, then, is the important government interest in demanding that they receive an eleventh station or a twelfth station, regardless of the level of viewer interest in the stations and regardless of other programmers seeking access to viewers in that community? The idea that "more is better," in spite of

the consequences to others, is not a substantial basis on which to rest the must-carry law.

A close look at this interest, therefore, again points up the difference between preserving the local broadcast *system* and preserving individual broadcast *stations*. To serve the first interest, the Government might have established (though it did not) a *minimum* obligation for cable systems—consistent from community to community—assuring that they carry enough local broadcast programming, measured by number of stations or percentage of viewership, to preserve the local broadcast system.[12] To serve the second interest, however, the Government, almost by definition, has to require carriage of the *maximum* number of stations. This approach leads to the anomalous proposition that the less important a station is to viewers, the more important it is that a cable system be compelled to carry it. Yet, as its asserted interest has shifted, that is essentially the proposition that the Government is advancing.

The same point applies to noncommercial stations as well. There is a clear difference between establishing a baseline for the provision of noncommercial television in each community and decreeing that all stations be carried. Although the public television stations have argued about the importance of "universal access" (*see, e.g.*, Publ. Broad. Mem. 11, 19, 20)—a phrase that seems to mean nothing more than carriage of every station—they have never explained why it is necessary for some communities

[12] The prior must-carry rules did contain a minimum viewership requirement, but the present law does not. *See* Jt. Stip. Facts ¶ 13. Although the Government has defended the lack of a viewership standard on the ground that (assuming a standard comparable to that in prior rules) many stations could not meet it, that argument is very close to a *non sequitur*. The whole point of a viewership standard, of course, is to distinguish broadcast programming of significant interest in the community from programming that is not. The inability of a free broadcast station to attract any substantial viewership is a good reason to allow other programmers the opportunity to reach that community; it is not a point in favor of requiring carriage of the broadcast station anyway.

to have three stations when others have two, or why that third station is more important than *any* possible cable programming seeking access to that channel. The closest that they come to an answer is to suggest that their programming is both different and uniquely special. *See* Publ. Broad. Mem. 16-19. If that were truly the reason, of course, that part of the law would respect discrimination based on content, thereby making it even more susceptible to invalidation under the First Amendment.

D. The Government also makes the unsurprising point that stations with few viewers tend to be less financially strong (and thus more in need in assistance). But the financial weakness of a particular station is not, by itself, a solid ground for requiring its carriage—any more than the weakness or even failure of particular firms in any market is a ground for declaring the market "dysfunctional" in antitrust terms. *See United States v. Syufy Enterprises*, 903 F.2d 659, 664 (9th Cir. 1990) ("the nature of competition is to make winners and losers"). Indeed, protection against failure is usually regarded as impairing the market vitality, growth, and innovation produced by competition. Thus, as in any marketplace, the marketplace for speech will have winners and losers, typically depending upon whether the speech is of value to the public. Absent exceptional circumstances, it is up to the public to decide whether it wishes to support particular speech, not the government.[13] *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

In any event, it is important to recognize that the must-carry law is not at all tailored to the plight of stations likely to go bankrupt. *See Turner*, 114 S. Ct. at 2480 (O'Connor, J., concurring in part and dissenting in part). Most obviously, it applies to any electing station, not just

[13] We also note that even "financially precarious" stations only rarely go "dark." *See* Gov't Opp. Mem. 49. And, what is critical for each "dark" station, many, many more stations entered the market: "sign ons" through 1985-1992 dwarfed the number of "dark" stations. *Ibid.*

stations in severe financial difficulty. *Id.* And, in addition, it permits cable systems to give priority to stations exercising their retransmission consent rights and duplicative network affiliates, even though those stations are obviously not threatened with bankruptcy. *See* 47 U.S.C. § 534(b)(5); 47 C.F.R. §§ 76.55, 76.56. It is apparent, therefore, that the law is not meant, and should not be used, as financial assistance for stations with little-watched programming.

The interest in protecting individual stations can also be served by various means—most obviously, direct subsidies—that are better tailored to the problem.[14] First of all, the use of subsidies would advance the speech of financially precarious broadcast stations without directly suppressing the speech of cable programmers. Although subsidies do involve favoritism of a sort, that method has the advantage of advancing speech without diminishing the rights of other speakers, as the must-carry law does.[15]

[14] Although Judge Sporkin dismissed all other means as less effective, the one-sided nature of that inquiry makes it impossible to answer the critical question: whether the Government has met its "burden of showing that the remedy it has adopted *does not 'burden substantially more speech than is necessary* to further the government's legitimate interest.'" *Turner*, 114 S. Ct. at 2470 (plurality opinion) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (emphasis added). For example, even if the Government could demonstrate some substantial interest in assuring that every broadcast station is available to every viewer in its local community, it is clear that this interest can be served by the use of an inexpensive switch allowing cable subscribers to receive over-the-air signals as well. Alternatively, broadcast stations would be able to reach cable subscribers through use of leased access channels, which provide access on a *nondiscriminatory* basis. The Government cannot show that any *marginal* benefits of its chosen method would justify the much greater intrusion on speech caused by foreclosing a competing programmer from its audience in that community.

[15] Special help based on financial difficulty, without harming other speakers, is far from unfamiliar. *See, e.g., O.D.T. Int'l*, 75 R.R.2d 393 (1994) (routine temporary transfers of bankrupt stations to trustees or receivers to protect value of station); *Tulsa 23*, 67 R.R.2d 620 (1990) (financial distress, short of bankruptcy, as

As Justice Marshall noted, relying on a number of prior Supreme Court decisions, the "State may use its own resources for subsidization, *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), but that interest, standing alone, cannot justify interference with the speech of others. *Pacific Gas & Electric Co.*, 475 U.S. at 24 (Marshall, J., concurring in judgment) (citing *Buckley*, 424 U.S. at 48-49; *Bellotti*, 435 U.S. at 790-92).

The provision of subsidies also would allow for more precise targeting of stations truly in need of assistance. As Justice O'Connor pointed out, the must-carry obligations "disadvantage cable programmers . . . even if the broadcaster that would have to be dropped to make room for the cable programmer would survive without cable access." *Turner*, 114 S. Ct. at 2480. Although broadcasters (like cable programmers) plainly would rather be carried than not, they (unlike cable programmers) are available over the air. It is by no means certain, therefore, that they cannot continue to attract viewers without facing financial collapse. But, if they do, the remedy is straightforward: "[p]rotect those broadcasters that are put in danger of bankruptcy, without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event." *Id.*

Judge Sporkin, however, dismissed the granting of subsidies as a less restrictive means, saying, first, that subsidies would involve an out-of-pocket cost to government and, second, that they would require the government to make sure of the recipients' actual need. Both reasons are irrational. First of all, it seems almost self-evident that a desire to avoid cost cannot, without more, be a legitimate ground for government to rely on other means that are more intrusive on speech. Given the presumption against government regulation of speech, it would be

ground for permitting multiple ownership of stations in market); 47 C.F.R. § 76.922(i) (hardship relief from cable rate regulation); 15 U.S.C. §§ 1801-04 (Newspaper Preservation Act, permitting joint operations to preserve failing newspapers).

particularly inappropriate for government to mandate that private parties support favored speakers, even though it is unwilling to do so on its own. Put another way, if the government interest is not strong enough to justify an expenditure of government funds, it is *a fortiori* not strong enough to justify broad, intrusive restrictions on the rights of private speakers. And, as for the second reason, it is peculiar at best to say that the difficulty of matching funds to deserving stations is enough to allow government to require preferences for *all* stations, whether deserving or not.[16] That blanket approach, in fact, seems to be the paradigm of an ill-tailored law.

IV. THE MUST-CARRY LAW IS A SUBSTANTIAL RESTRICTION ON FREEDOM OF SPEECH

The Government has repeatedly argued, during the course of this case, that the must-carry law really does not burden a great deal of speech. But this argument is unavailing for several reasons. In the first place, even if it were correct, it is irrelevant: because there is no genuine, substantial interest to support the sweeping reach of the must-carry law, the Government cannot excuse the unnecessary intrusion on speech by saying that it is only a modest burden. And, in any event, the argument is incorrect. The must-carry law restricts the programming available to two out of every three cable subscribers across the country.

It is important, with respect to the first point, to recognize that the *O'Brien* test is not a balancing test: it is a series of requirements, each element of which must be satisfied. *See O'Brien*, 391 U.S. at 377; *Turner*, 114 S. Ct. at 2469, 2470. Here, as we have discussed, there is no genuine government interest substantial enough to justify

[16] To make matters worse, Judge Sporkin then described the must-carry law as "simply ensur[ing] that a broadcast station will have *equal* access to viewers." (J.S. App. 26a) (emphasis added). This Court has already recognized that the law gives broadcast stations "favored" access compared to "disfavored" cable programmers. *See Turner*, 114 S. Ct. at 2460.

a law overriding any decision by any cable system to deny carriage to essentially any local broadcast station for any reason. If that is correct, then the Government cannot avoid invalidation of the law by saying that, all that notwithstanding, the cable systems can still decide on programming for the *rest* of their channels or that cable programmers excluded from one community (by the preference given in the law) can still try to be heard in *another* community. A law that needlessly harms those engaged in speech is not saved because it does not harm them even more.[17]

In any event, the Government (as regulators of speech often do) has significantly understated the burdens imposed by the law on freedom of speech. Although other appellants address these matters in greater detail, we note here the most obvious points. Notably, the Government has wholly ignored the central facts with respect to the effect of the law; approximately half of all cable systems, serving approximately two-thirds of all cable subscribers, have no available capacity; and the number of programmers seeking access greatly outstrips capacity. *See* J.S. App. 90a (Williams, J., dissenting). To the extent that those systems are compelled to carry broadcast stations involuntarily, their subscribers are cut off from other programmers seeking access to those channels, and other programmers (those not carried already) are cut off from reaching those subscribers. It is the programming chosen by the Government, not the programming preferred by the cable system, that must be seen.

To get around this problem, the Government below put forth a bewildering array of numbers, ostensibly to show that the law affects only a small percentage of overall channels and that cable programmers are doing well in

[17] Before the *O'Brien* test is applied, of course, there must be a preliminary determination whether the regulation—because of its effects on speech—must be subjected to heightened scrutiny under the First Amendment. This Court unanimously resolved that issue against the Government. *See Turner*, 114 S. Ct. at 2456-58.

spite of the law. *See* Gov't Mem. 82-117. But even aside from difficulties with some of the numbers themselves, the numbers simply do not establish the point apparently urged by the Government: that there is no significant First Amendment injury from the must-carry law. Most obviously, the Government misses the point that national averages do little to measure actual effects on speech. It does not lessen the burden on those cable systems that lack available capacity—and, therefore, are forced to carry broadcast stations that they would choose to drop in favor of other programming—that *other* systems have available capacity and have decided voluntarily to carry all local broadcast stations.[18] Likewise, it is a direct interference with the rights of cable programmers to be told that the law prevents them from being heard in some communities, whether or not they are being heard in other communities. *See* J.S. App. 91a & n.23 (Williams, J., dissenting).

The Government also fails to understand the extent of speech involved. For example, if the law requires a cable system to carry two broadcast stations that it would not otherwise carry, it is depriving subscribers to that system of two channels of programming that they might prefer to watch. These channels likely would provide news, or sports, or other entertainment 24 hours a day, 7 days a week, every week of the year. Although the affected subscribers have other choices, the fact remains that, in that community, the Government has silenced an extensive amount of speech. And it is the speech silenced that provides the best measure of the burden imposed by a restriction on speech. *See National Treasury Employees Union*, 115 S. Ct. at 1013 (noting that law served as "wholesale

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[18] This observation works both ways. If one-half of the cable systems carried ten broadcast stations and the other one-half carried none, the fact that the average cable system carried five stations would not mean that, in the latter group of communities, the broadcast system was fully viable. The record here, of course, shows that cable systems in essentially *every* community carry all but the littlest-watched broadcast stations.

deterrent to a broad category of expression by a massive number of potential speakers").

The emphasis on numbers is also misleading. Although the Government apparently finds it of little significance to occupy a few channels on an average cable system, it would be quite startling to think that it could similarly dictate the choices (in general, content-neutral terms) in publications, or theatres, or art galleries. A law requiring newspapers to devote one page to unpublished authors, or art galleries to devote five percent of their exhibition space to previously unshown artists, or theatres to devote one night a week to unproduced playwrights—although it would still leave them control over most of their pages, exhibitions, and productions—would plainly be a substantial interference with freedom of speech. And that interference, we submit, would not be adequately justified by saying that, absent this government mandate, the favored writers, artists, and playwrights might be financially worse off.

A similar problem infects the argument that cable programmers suffer little harm because they are increasing their audiences overall. If the government imposes a barrier between a speaker and his desired audience, the First Amendment interests of speaker and audience cannot be overridden simply on the ground that the speaker remains free to speak to a *different* audience. *See Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"). Here, if a cable system is unable to carry a particular cable programmer (*e.g.*, Court TV or the Learning Channel) because of its Government-imposed must-carry obligations, then that programmer is likely closed off from subscribers in *that community*. The converse is naturally true as well: subscribers in that community are unable to receive that programming. *See National Treasury Employees Union*, 115 S. Ct. at 1015 (restrictions on the right to speak impose corresponding restrictions on the right to hear).

The general benefits of reaching a greater overall number of subscribers (wherever located) would also seem self-evident. After all, the Government itself makes much of the connections between viewership, advertising revenues, and programming. *See, e.g.*, Gov't Mem. 30-31. Having established this linkage, it is contradictory for the Government not to acknowledge that a loss of subscribers, resulting from the must-carry law, would cause harm to cable programmers, even if the programmers have a substantial base of subscribers anyway. And, for newer cable networks, the loss of access to subscribers can make it considerably more difficult to establish and perpetuate a viable service.

Finally, the Government has argued that any burdens are temporary: that expanding capacity will allow access for all programmers. *See* Gov't Mem. 90-96. This argument falls on several fronts. As an initial matter, the Government's argument by its terms takes a "quantum leap" (*id.* at 93) from evidence of *some* increases in capacity by *some* (even many) cable systems to the conclusion that ready ability to carry all programmers, without capacity-constrained choice, is on the horizon. But there is not the slightest support for the speculation that the supply of channels will outrun the supply of programming at any foreseeable point. Recent history suggests, in fact, that there is always vastly more programming than space to accommodate it. There are today well over 100 cable programming networks, while most cable systems have capacity of less than 54 channels. *See* J.S. App. 90a (Williams, J., dissenting). This situation is not likely to change in the near future. Klein Decl. ¶ 11 (J.A. 1138); Maguire Decl. ¶ 28; Clouston Aff. ¶ 4 (J.A. 1056-57). As noted, most subscribers today get their programming from systems with *no* available channels; and appellees' expert testified that unused capacity is in any event always temporary because it is built by operators for planned use. J.S. App. 93a (Williams, J., dissenting).

The must-carry law thus must be defended on the present record—not on the ground that, someday, it might become constitutional. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 128-31 (1989); *Century*, 835 F.2d at 304-05; *Quincy*, 768 F.2d at 1463. If the days of unlimited capacity ever come, and if Congress then believes that must-carry obligations are still necessary, it may enact a properly tailored law and seek to justify it on the basis of those new circumstances.[19] But, whether or not Congress could impose some kind of must-carry obligations on systems having 500 channels or systems having substantial unutilized capacity, it has not done so in this law. It has required *every* cable system to carry *every* qualifying local broadcast station (up to the cap), even if the result is to exclude other desired programming. That law is substantially broader than any possible legitimate response to the problem, and it must be struck down.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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[19] Of course, if there comes a time when systems have virtually unlimited capacity, it would then be highly doubtful that the Government could establish (as, indeed, it cannot today) that voluntary decisions about carriage would put the broadcast system in serious jeopardy.